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September 3, 2004

**EX PARTE COMMUNICATION**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., TW-A325  
Washington, DC 20554

**Re:        Response to CBeyond *et al.* and Sprint re AT&T's SBR compensation  
             payment plan, Pay Telephone Reclassification and Compensation  
             Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128**

Dear Ms. Dortch:

The American Public Communications Council ("APCC") has filed several ex partes<sup>1</sup> supporting AT&T's proposal to enable switch-based resellers ("SBRs") to be relieved of call tracking and compliance burdens under the FCC's new dial-around compensation rule by having their Intermediate Carriers ("ICs") pay compensation to payphone service providers ("PSPs") for 100% of calls delivered to the SBR. In *CBeyond's Payment Relief Ex Parte*<sup>2</sup> and *Sprint's Payment Relief Ex Parte*,<sup>3</sup> *CBeyond et al.* and *Sprint* argue that to *actually require* an IC to pay for 100% of the calls after the IC has *voluntarily* undertaken to do so, with the agreement of the SBR who in turn is relieved of its call tracking obligations, is somehow inappropriate and burdensome on *both* the IC and SBR. Merely to state their position is to demonstrate its vacuity. We nonetheless discuss these carriers' fallacious claims further below.

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<sup>1</sup> AT&T's SBR Compensation Payment Plan, Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, July 26, 2004 ("*APCC's AT&T SBR Compensation Payment Plan Ex Parte*"); Defects of AT&T's SBR Compensation Payment Plan, Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, June 15, 2004 ("*APCC's Defects Ex Parte*"); and Amplification of APCC's Views on AT&T's Petition for Reconsideration, Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, May 21, 2004 ("*APCC's Amplification Ex Parte*").

<sup>2</sup> Letter to Marlene H. Dortch, Secretary, FCC, from Kathy L. Cooper, Kathleen G. Ramsey, and Danielle C. Burt, August 11, 2004. ("*CBeyond's Payment Relief Ex Parte*").

<sup>3</sup> Letter to Marlene H. Dortch, Secretary, FCC, from John E. Benedict, Senior Attorney, Sprint, August 18, 2004. ("*Sprint's Payment Relief Ex Parte*").

**I. Requiring ICs To Pay What They Have Undertaken To Pay Does Not Reinstate The First-Facilities-Based-Carrier-Pays Rule**

By urging the Commission to require ICs to actually pay compensation for 100% of calls delivered to a SBR if the IC undertakes to do so, the APCC is in no way seeking to reinstate the first-facilities-based-carrier-pays rule, as CBeyond *et al.* and Sprint claim. CBeyond's *Payment Relief Ex Parte* at 1; Sprint's *Payment Relief Ex Parte* at 1. That rule required Intermediate Carriers ("ICs") to pay compensation to payphone service providers ("PSPs") for calls routed to switch-based resellers ("SBRs"). APCC is merely proposing that, when an IC *voluntarily undertakes* to pay compensation to PSPs for all calls delivered to a SBR, and the SBR is thereby exempted from compliance with the compensation rule safeguards, ICs must actually pay compensation for 100% of the calls as long as the IC's agreement with the SBR is in effect.<sup>4</sup>

Granting AT&T's petition subject to this caveat would not in any way undermine the principle that, *in the absence of voluntary agreement by the IC*, the SBR should pay PSPs directly for the calls it completes to end users. As APCC stated earlier in its response to MCI's recent *ex parte*:

APCC's proposed conditions do not in any way interfere with maintaining SBRs' responsibility to pay compensation when they have not been exempted from the rule. The Commission need only require that, when an IC *says* it will pay the PSP so that a SBR can be exempt from complying with the rule's safeguards, the IC *must actually pay* the PSP until its payment agreement is terminated.<sup>5</sup>

In essence, APCC is simply seeking to ensure that, if an IC and a SBR make a payment arrangement, and if PSPs are "deemed" (*Sprint Payment Relief Ex Parte* at 2) to have agreed to that arrangement in order to relieve the IC and SBR of the need to secure PSPs' actual consent, then PSPs must have the same rights as they would have if they actually were parties to the agreement – namely the right to enforce the payment the IC has agreed to make. Thus, APCC is not seeking to return to the old rule, but rather to preserve the current rule, in which PSPs have the right to be parties to, and thereby to protect their rights in, any alternative payment arrangements proposed by carriers.

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<sup>4</sup> AT&T's petition and APCC's position on that petition are independent of APCC's own Petition for Clarification or Reconsideration, in which APCC does seek a ruling that ICs automatically have "default" liability for calls routed to SBRs if the SBR chooses not to undergo the system audit that qualifies the SBR to pay compensation directly to PSPs. The APCC Petition *does* seek to reinstate the first-facilities-based-carrier-pays rule as a default rule.

<sup>5</sup> Response to MCI re AT&T's SBR compensation payment plan, Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, August 4, 2004, at 2 n.3 ("*APCC's Reply to MCI Alternative Arrangements Ex Parte*").

## **II. Requiring ICs to Pay What They Have Undertaken To Pay Will Not Cause ICs To Terminate Their Agreements**

CBeyond *et al.* and Sprint also claim that if ICs who agree to assume tracking and payment functions for SBRs are actually required to compensate PSPs, ICs “would likely terminate such agreements.” CBeyond’s *Payment Relief Ex Parte* at 2; Sprint’s *Payment Relief Ex Parte* at 1. As noted in APCC’s *Reply to MCI’s Alternative Arrangements Ex Parte*, the record shows the opposite. AT&T has clarified that, *inter alia*, it will “pay for calls delivered to SBRs while [an AT&T-SBR payment agreement] is in effect whether or not AT&T is reimbursed by the SBR,”<sup>6</sup> and MCI has previously explicitly told the Commission it is willing to accept a payment requirement when SBRs opt out of compliance with the rule’s safeguards. APCC’s *Reply to MCI’s Alternative Arrangements Ex Parte* at 2-3.

Sprint claims that AT&T has not, in fact, accepted any enforceable obligation to pay.<sup>7</sup> AT&T’s *ex partes*, however, speak for themselves, and AT&T is capable of speaking for itself. As to MCI, Sprint argues that MCI’s past statements prove nothing because MCI currently objects to being held responsible for payment even when it has undertaken to pay. The question, however, is not whether MCI objects to APCC’s proposed rule; rather the question is how MCI – or other ICs – will behave once the rule is in force. An IC that refuses to enter payment arrangements with its SBR customers under those conditions is likely to find its customers moving to other, less rigid ICs. APCC doubts whether any IC is so opposed to being held to its commitments that it would be willing to lose customers to its competitors. And MCI’s past willingness to accept a more onerous requirement strongly suggests that MCI is particularly unlikely to let its regulatory advocacy dictate its business decisions.

## **III. Allowing Carriers To Impose “Negative Option,” Consent To Alternative Agreements Would Be Unnecessarily Confusing And Unfair To PSPs**

It is wholly unnecessary to authorize carriers to impose “negative option” consent on PSPs in order to grant AT&T’s petition.<sup>8</sup> By resurrecting the idea of “negative option” consent to alternative payment arrangements, CBeyond *et al.* introduce unnecessary confusion. APCC has agreed that, if an IXC makes an enforceable commitment to paying on 100% of calls delivered to a SBR, the PSPs’ consent to this arrangement is not required. Such arrangements may be implemented

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<sup>6</sup> Letter to Marlene Dortch, Secretary, FCC, from Martha Lewis Marcus, Senior Attorney, AT&T, July 21, 2004.

<sup>7</sup> Sprint claims that APCC “seriously misrepresents AT&T’s stated position by implying that it agreed to a rule change making ICs directly liable for SBRs.” Sprint *Payment Relief Ex Parte* at 3. APCC made no such implication.

<sup>8</sup> The “negative option” concept “recognizes consent for an IC Agreement unless a PSP objects after being provided notice.” CBeyond’s *Payment Relief Ex Parte* at 2.

even over a PSP's affirmative objection. Under those conditions, there is no need for an inference of "negative option" consent.<sup>9</sup>

Reintroducing the "negative option" concept would serve only to facilitate carriers' imposition of *other* payment arrangements that do not include the conditions necessary to protect PSPs' rights. Such use of the "negative option" concept would be not only confusing, but also inherently one-sided and, thus, unfair to PSPs, who would arbitrarily be assigned the burden of exercising the negative option. In this regard, CBeyond *et al.* seem to assume that it is the PSPs who should be required to exercise a "negative option," implying that all of the difficulty involved in obtaining affirmative consent is on the carriers' side. But that is not the case. While there are hundreds of PSPs involved in the compensation system, there are also hundreds of carriers with whom PSPs and their clearinghouses must deal. If "negative option" consent is a reasonable method for carriers to infer PSPs consent to carriers' proposals, it must be an equally reasonable means for PSPs or their clearinghouses to infer carriers consent to alternative arrangements proposed by PSPs. Indeed, use of "negative option" posting by PSPs would appear to be more in keeping with normal commercial transactions, in which the service provider (here the PSP) typically proffers form contracts to the customer (here the IXC).

If the Commission were to rule that "negative option" consent may be imposed only by carriers, and not by PSPs, the Commission would unfairly tilt the compensation system, which is already structurally biased in the carriers' favor, even further in the carriers' favor. In the payphone compensation context, where PSPs have no ability to bargain over the terms of payment because they cannot control the use of their payphones, allowing carriers to impose negative-option agreements on PSPs would simply open the door to carrier abuse. Carriers would tend to push the "negative option" principle to its logical limit – seeking to trap unwary PSPs by inferring their consent, absent an affirmative objection, to any compensation arrangements, however unfair – and indeed, to any compensation *rate* a carrier might choose to post on its web site. Alternatively, if the Commission rules that "negative option" consents may be imposed by either side, the Commission would likely tie itself up in proceedings to determine which types of payment terms may be imposed by each side and what makes those terms "reasonable" enough that consent may be inferred absent an affirmative objection by the other side.

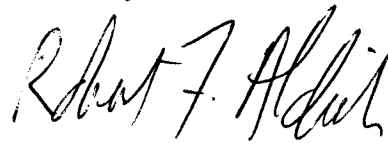
For all these reasons, the Commission should not invite confusion and carrier abuse by unnecessary injecting the "negative option" concept into its ruling on alternative payment arrangements. To the extent that carriers wish to introduce individual variations into payment arrangements with PSPs, or vice versa, there are no

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<sup>9</sup> APCC strongly disagrees with CBeyond *et al.*'s claim that *any* IC arrangement to pay for all calls delivered to a SBR, whether or not the arrangement complies with APCC's proposed conditions, is in the interest of PSPs. On behalf of more than 1,000 PSPs, APCC is exercising a "negative option" by objecting to IC-SBR payment arrangements that cannot be enforced by PSPs.

insuperable barriers to doing so. There are clearinghouse entities operated by both IXC's and PSP's that can facilitate obtaining consent to such arrangements if they are genuinely in the interest of both sides.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with the first name "Robert" and last name "Aldrich" clearly distinguishable.

Albert H. Kramer  
Robert F. Aldrich

cc (by e-mail and hand delivery):

Chris Libertelli  
Dan Gonzalez  
Matthew Brill  
Jessica Rosenworcel  
Scott Bergmann  
Jeffrey Carlisle  
Bill Dever  
Darryl Cooper  
Denise Coca